IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. DERRICK HILLS, Appellant.	)	No. 61290-5-I DIVISION ONE UNPUBLISHED OPINION FILED: May 18, 2009

Appelwick, J. — A jury convicted Derrick Hills of one count of promoting prostitution in the second degree. He appeals, arguing that RCW 9A.88.080(1)(b) is unconstitutional as applied, because it prohibits protected speech. Additionally, he claims the court violated the Washington Constitution's mandate that illegally obtained evidence be excluded as the fruit of the poisonous tree when it allowed the testimony of a witness. He also claims he was denied effective assistance of counsel when his attorney did not impeach a witness. Last, Hills claims the evidence is insufficient to support his conviction. Finding no error, we affirm

FACTS

In 2006, a jury found Derrick Hills guilty of delivery of cocaine to a minor and promoting prostitution in the second degree. On appeal, this court reversed the

conviction because the trial court erred in not suppressing evidence obtained from Hills' unlawful seizure.[1] A new trial was held in 2007, which is the source of this appeal, on the charge that Hills promoted prostitution in the second degree.

In April 2005, L.B. was 16 years of age. She was a runaway, who had been ordered to a juvenile drug treatment center in Tacoma, Washington. After one night, L.B. left the treatment center accompanied by 13 year old R.W.

Seeking to get high, the two girls found their way to Seattle. L.B. and R.W. met a woman, "Sierra," with whom they smoked crack. L.B. recalled that Sierra said she "knew somebody that would give us a job." Sierra then introduced the girls to Derrick Hills. Hills took L.B. and R.W. to a Jack in the Box restaurant on Aurora Avenue. Hills paid for the meal. After eating at the Jack in the Box, the three went to a bus stop where Hills bought L.B. a pair of shoes from a street vendor.

While sitting at the bus stop, Hills instructed L.B. on how to prostitute herself. Hills told L.B. how to choose customers, what to charge for oral and vaginal sex, that she should require the use of a condom, and to not get in vehicles with black or Hispanic men, because they could be more violent. Hills instructed L.B. to look for a bulge in the sock of a potential client, because it could be indicative of a police officer.

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[1] The 2007 decision from this court reviewing Hills' first jury verdict, concluded that that:

> Even viewed in their totality, the circumstances known to the officers did not include specific and articulable facts suggesting that Hills was involved in or about to be involved in some criminal activity. Accordingly, his detention was unlawful and the trial court should have suppressed Hills' statements to police, which were obtained as a result of the unlawful seizure. But contrary to Hills' suggestion, the suppression of his statements does not require dismissal of the prosecution. The State may choose to retry Hills using evidence untainted by the unlawful seizure, including the testimony and evidence provided by [R.W.] and [L.B.].

State v. Hills, noted at 139 Wn. App. 1010, 2007 WL 1666643 at *4.

Hills then directed L.B. to "walk down the street and walk back." L.B. followed these instructions, but "nothing happened." Again, she walked down the street and back. On her third attempt at walking the street, a car honked its horn at L.B. and she got into the car. But, L.B. did not perform any sex acts, because the man in the car did not have a condom. L.B. then walked back to Hills, who was still at the bus stop. Hills told L.B., "well, we'll just try it one more time then we'll leave or whatever." L.B. got in another car, but left when she suspected the man was a cop, because of a bulge in his sock. During both of these encounters, Hills was approximately one block away.

After L.B. was not successful, the three decided to move to another location. Hills, R.W., and L.B. went to a gas station on Aurora Avenue to find a ride to "get another spot." They got into a car belonging to a friend of Hills. The car was pulled over by police. Hills handed a bag of cocaine to L.B. and told her to "stick it in between [her] legs or swallow it." The driver was arrested for outstanding warrants. At some point, Hills was ordered out of the car. L.B. and R.W. were also ordered out of the car and told to stand near the back of the vehicle.

Seattle Police Officer Bailey noted that the girls looked young. Either Officer Bailey or Officer Street asked the girls what they were doing with the men. Initially L.B. lied about her age. But, she eventually told Police that she was a sixteen year old runaway. Police searched the purses of both L.B. and R.W. The girls were then placed in a police vehicle for transport to the North Precinct station and subsequently to a shelter for runaways. Once in the car, L.B. turned over to the Police the cocaine given to her by Hills. She also explained that Hills was training her to be a prostitute.

In the second trial, the State charged Hills with one count of delivery of cocaine and one count of promoting prostitution in the second degree.

Hills filed a 3.6 motion seeking suppression of "all the evidence in this case," because L.B. was illegally seized when the car was stopped by police. Following a 3.6 hearing, the trial court found "[t]here was no testimony that any of the officers had any officer safety concerns which would have justified removing all of the passengers from the vehicle at any time during this detention of the passengers." The trial court concluded that pursuant to State v. Jones, 146 Wn.2d 328, 45 P.3d 1062 (2002), Hills had standing to challenge the evidence. The court further determined that the police community care taking function does not extend to situations where police inquiries are coercive in obtaining drug evidence from minors. Therefore, the court granted Hills' motion to suppress the cocaine.

The State dismissed the charges relating to the cocaine. A jury trial was held only on the charge of promoting prostitution in the second degree. The State offered the testimony of L.B. regarding Hills' instruction on how to prostitute herself. A jury convicted Hills of the crime of promoting prostitution in the second degree. Hills appeals.

ANALYSIS

I. Constitutionally Protected Speech

Hills asserts that RCW 9A.88.080(1) and 9A.88.090(1), under which he was convicted, are unconstitutional limitations on protected speech.

The First Amendment, applicable to the States through the Fourteenth

Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The hallmark of the protection of free speech is to allow "free trade in ideas"—even ideas that the overwhelming majority of people might find distasteful or discomforting. Abrams v. United States, 250 U.S. 616, 630, 40 S. Ct. 17, 63 L. Ed. 1173 (1919). A statute is presumed constitutional and the party challenging the statute has the burden of proving its unconstitutionality. State v. Myers, 133 Wn.2d 26, 31, 941 P.2d 1102 (1997); City of Seattle v. Eze, 111 Wn.2d 22, 26, 759 P.2d 366 (1988).

The State charged Hills with promoting prostitution in the second degree, RCW 9A.88.080(1)(b). The jury found him guilty of the crime. Hills claims that his conduct was to merely engage in speech—a protected activity. RCW 9A.88.080(1) states that:

> A person is guilty of promoting prostitution in the second degree if he knowingly:
> (a) Profits from prostitution; or
> (b) Advances prostitution.

RCW 9A.88.060(1) defines that a person "advances prostitution" if:

> acting other than as a prostitute or as a customer thereof, he causes or aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution.

Hills argues that these statutes prohibit constitutionally protected speech. The Washington State Supreme Court does not agree. State v. Cann, 92 Wn.2d 193, 595 P.2d 912 (1979). In Cann, the Court addressed a constitutional challenge to the same statute under which Hills was convicted. Id. at 194. In rejecting the constitutional

challenge, the Court held that "[s]peech directed toward the persuasion of another to enter into an illegal arrangement does not enjoy constitutional protection." Id. at 195-96; see also State v. Carter, 89 Wn.2d 236, 570 P.2d 1218 (1977) (upholding a similar challenge to the predecessor to RCW 9A.88.080). Moreover, like the defendants in Cann and Carter, Hills engaged in more than mere instructional speech: Hills instructed L.B. on how to prostitute herself, encouraged her to walk the street, supervised her as she entered two cars, told her to "try it again," and moved L.B. to another spot for prostitution when she was not successful. Hills' conduct persuaded L.B. to enter into illegal arrangements. Washington law clearly establishes that such speech does not enjoy constitutional protection.

We hold that RCW 9A.88.080(1)(b) is not unconstitutional as applied to Hills.

II. Suppression of Evidence

Next, Hills argues that the trial court erred in denying his motion to suppress all evidence obtained as a result of the traffic stop, including the testimony of L.B.

It is well settled that article I, section 7 of the Washington Constitution provides greater protection to individual privacy rights than the Fourth Amendment. E.g. State v. Hendrickson, 129 Wn.2d 61, 69 n.1, 917 P.2d 563 (1996); State v. Stroud, 106 Wn.2d 144, 148, 720 P.2d 436 (1986); State v. Williams, 102 Wn.2d 733, 741–42, 689 P.2d 1065 (1984). Article I, section 7 provides that "[n]o person shall be disturbed in his private affairs, or his home invaded, without authority of law." Const. art. I, § 7. This provision is violated when the State unreasonably intrudes upon a person's private affairs. State v. Boland, 115 Wn.2d 571, 577, 800 P.2d 1112 (1990); State v. Myrick,

102 Wn.2d 506, 510, 688 P.2d 151 (1984). Evidence that is the product of an unlawful search or seizure is not admissible. Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). But evidence will not be excluded as "'fruit'" unless the illegality is at least the "'but for'" cause of the discovery of the evidence. Segura v. United States, 468 U.S. 796, 815, 104 S. Ct. 3380, 82 L. Ed. 2d 599 (1984). Suppression is not justified unless "'the challenged evidence is in some sense the product of illegal governmental activity.'" Id. (quoting United States v. Crews, 445 U.S. 463, 471, 100 S. Ct. 1244, 63 L. Ed. 2d 537 (1980)). We are to make a commonsense evaluation of the facts and circumstances of the particular case to determine whether there is a nexus between the evidence in question and the police conduct. State v. Aranguren, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985).

When police officers stop a vehicle to investigate and/or arrest the driver, their authority over any passengers is limited by the Fourth Amendment and article I, section 7 of the Washington Constitution. State v. Mendez, 137 Wn.2d 208, 970 P.2d 722 (1999) (overruled on other grounds by Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007)). An officer may order passengers to exit or stay in the vehicle to "control the scene and ensure his or her own safety" when there is an "objective rationale predicated specifically on safety concerns, for officers, vehicle occupants, or other citizens." Id. at 220. Additionally, officers may frisk passengers when there are "specific, articulable facts giving rise to an objectively reasonable belief that the passengers could be armed and dangerous." State v. Horrace, 144 Wn.2d 386, 399-400, 28 P.3d 753 (2001).

As a threshold matter, the State asserts that Hills lacks standing to seek suppression of L.B.'s testimony. L.B. does not assert that her constitutional right to privacy was violated by the search. The State does not appeal the suppression of the cocaine found on L.B. or her statements that Hills gave them to her. Therefore, the only standing issue that concerns this appeal is whether Hills has standing to challenge L.B.'s detention and seek suppression of her subsequent testimony about prostitution to the police.

To seek exclusion of the product of illegal police activity, the defendant must, however, be asserting that his or her own rights were violated. State v. Williams, 142 Wn.2d 17, 21–22, 23, 11 P.3d 714 (2000); State v. Magneson, 107 Wn. App. 221, 225, 26 P.3d 986 (2001). However, where the challenged police action produced evidence against a defendant, he or she may assert automatic standing if (1) charged with an offense that involves possession as an essential element; and (2) must be in possession, either actual or constructive, of the subject matter at the time of the search or seizure. State v. Jones, 146 Wn.2d 328, 332–33, 45 P.3d 1062 (2002); State v. Simpson, 95 Wn.2d 170, 181, 622 P.2d 1199 (1980). In Williams, the Washington Supreme Court held that the defendant did not have standing to challenge whether third party's rights were violated when the homeowner consented to warrantless entry, but the police unlawfully failed to advise the homeowner of the right to refuse entry. Williams, 142 Wn.2d at 23. The court explained that where there is no conflict in the exercise of Fourth and Fifth Amendment rights, automatic standing has no application. Id.

Here, Hills was charged with promoting prostitution in the second degree, a crime that does not involve possession as an essential element. He therefore lacks standing to assert that L.B.'s testimony should be suppressed. We hold that, because Hills exercise of his constitutional rights was not violated by L.B.'s seizure, he lacks standing to challenge any evidence against him.

III. Ineffective Assistance of Counsel

Hills argues that he was denied effective assistant of counsel when his attorney failed to impeach L.B. about her prior inconsistent testimony. Hills states that in the first trial L.B. testified that he instructed her on prostitution while at a Jack in the Box restaurant and that the traffic stop occurred immediately after leaving the restaurant. But, at the 3.6 hearing for the second trial, L.B. testified that Hills instructed her about becoming a prostitute in a bus shelter after eating at the restaurant. Because L.B.'s credibility was crucial to the State's case, the failure of Hills' counsel to impeach her testimony renders the performance deficient.

In order to establish ineffective assistance of counsel, the defendant must show (1) defense counsel's performance was deficient, and (2) the defense counsel's errors were so serious that they deprived the defendant of a fair trial. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is established by proof that defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." State v. McFarland, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). Legitimate trial strategy or tactics cannot be the basis of a claim of ineffective

assistance of counsel. State v. Garrett, 124 Wn.2d 504, 520, 881 P.2d 185 (1994). To establish the second prong of the test, the appellant must show that he was affirmatively prejudiced by the deficient performance such that, but for counsel's errors, the result of the proceeding would have been different. Strickland, 466 U.S. at 693-94.

Hills' fails to establish that his counsel's decision not to impeach L.B. rendered the representation deficient.[2] At the close of the State's case, Hills' defense counsel moved for a directed verdict because the evidence was insufficient in light of L.B.'s prior inconsistent testimony at the 3.6 hearing and prior trial. Counsel explained, "[i]n this case, the credibility difference in [L.B.]'s testimony coupled with her admissions that all of the other events of the day were muddled and mushed [sic], and that she has a tendency to lie, lie, lie, and then tell the truth." When asked by the trial court why counsel failed to impeach L.B., he explained "if I got into showing her the trial testimony for the jury, I would have then also alerted the jury that there was a prior trial . . . that a decision may not have been reached or that there was other evidence out there that they have not heard from which to infer guilt." Therefore, he explained, "I think those two inferences are a strategic matter." Clearly, the exchange establishes that Hills' counsel understood that credibility was at issue in the case, recognized that L.B. testified inconsistently, but chose not to impeach based on those statements because of strategic concerns.[3]

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[2] Although Hills' counsel did not impeach L.B., he did directly challenge her credibility asking, "Okay. In fact, you just testified that you would lie, steal, and do anything you could to get high except work."

[3] Hills also implies that the failure to impeach was the result of confusion regarding the court's prior rulings. Although counsel did state that the court's prior rulings limited his ability to impeach L.B., he later clarified that none actually limited his ability to explore L.B.'s prior testimony. Moreover, prior to L.B.'s testimony, the trial court instructed the attorneys to properly impeach her:

> So if we are referring to prior testimony, what I would like you all to do, as we all know the way to do proper impeachment, is first you ask your question, and if this is one

We hold that the performance was not deficient. Hills' claim for ineffective assistance of counsel fails.

IV. Sufficiency of the Evidence

Hills argues that insufficient evidence was introduced at trial to support his conviction for promoting prostitution in the second degree.

Evidence is sufficient to support a conviction if, when viewed in the light most favorable to the State, any rational trier of fact could have found the essential elements of the charged crime beyond a reasonable doubt. State v. Hosier, 157 Wn.2d 1, 8, 133 P.3d 936 (2006). We must draw all reasonable inferences from the evidence in favor of the State and interpret them most strongly against the defendant. Id. "A claim of insufficiency admits the truth of the State's evidence" and all reasonable inferences. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). We will reverse a conviction for insufficient evidence only when no rational trier of fact could have found that the State proved all of the elements of the crime beyond a reasonable doubt. State v. Smith, 155 Wn.2d 496, 501, 120 P.3d 559 (2005). In evaluating the sufficiency of the evidence, circumstantial evidence is as probative as direct evidence. State v. Goodman, 150 Wn.2d 774, 781, 83 P.3d 410 (2004).

Hills was convicted for knowingly advancing prostitution, which requires that he

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where you think it's going to lead to potential impeachment, you ask the witness do you recall on X date being under oath and testifying at a prior hearing, and was this the question that was asked of you and was this your response.

So we start with alerting everybody to where we're talking about. It's either a statement that she did apparently. I don't know if she did these statements for the officer under oath or not. That hasn't been brought up to me. But it's either the prior statements or the prior testimony.

So you need to refer to the date, time, and the type of hearing or that it was her written statement.

causes or "aids a person to commit or engage in prostitution, procures or solicits customers for prostitution, provides persons or premises for prostitution purposes, operates or assists in the operation of a house of prostitution or a prostitution enterprise, or engages in any other conduct designed to institute, aid, or facilitate an act or enterprise of prostitution." RCW 9A.88.060(1). Here, Hills instructed L.B. on how to attract potential clients, what to charge, and what kinds of customers to avoid. After providing this information, Hills told L.B. to walk the street, supervising her. When L.B. failed to perform any sex acts after the encounter with the first potential client, Hills told her to "try it one more time." At no time during L.B.'s attempts to prostitute herself was Hills more than one block away. According to L.B., he referred to the prostitution endeavor as "we." Hills sought to transport L.B. to a different location. Hills, L.B., and R.W. were en route to a different prostitution spot when police stopped the car. These facts are sufficient for a jury to find that Hills promoted prostitution.

We hold that the record is sufficient to support Hills' conviction.

We affirm.

WE CONCUR: